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HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1955

No. 814

ERNEST P. WILSON, PETITIONER,

versus

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

HENRY HAMMER,
Columbia, South Carolina,
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Supreme Court of the United States

OCTOBER TERM, 1955

No. .....

ERNEST P. WILSON, PETITIONER,

versus

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner prays that a Writ of Certiorari issue to review the decision and judgment of the United States Court of Appeals for the Fourth Circuit rendered in this case on February 29, 1956.

OPINIONS BELOW

The sentence imposed by the District Court is unreported. The opinion of the Court of Appeals is not yet reported and is printed in the appendix, *infra*, p. 11.

JURISDICTION

The decision of the Court of Appeals in this case was dated and entered on February 29, 1956. The jurisdiction of this Court is invoked under the provisions of 28 U. S. C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether a defendant can be convicted under Title 18 U. S. C., Section 202 of soliciting or accepting money to influence an official decision then pending or which may by law be brought before a person having authority to render a decision in his official capacity when such defendant has no authority or official capacity to render or recommend such a decision?

2. Whether a Federal Court of Appeals may sustain a conviction under Title 18 U. S. C., Section 202 because it is of the opinion that the defendant was guilty of aiding and abetting under Title 18 U. S. C., Section 2[redacted] when the indictment does not charge such offense of aiding and abetting, the defendant was not tried for such offense, the question of committing such offense was not submitted to the jury and there is no evidence to support such offense?

3. Whether the evidence of record is sufficient to sustain the action of the Court below in affirming the conviction of petitioner?

STATUTE INVOLVED

Section 202, Title 18 U. S. C. reads as follows:

"Sec. 202. Acceptance or solicitation by officer or other person.

Whoever, being an officer or employee of, or person acting for or on behalf of the United States, in any official capacity, under or by virtue of the authority of any department or agency thereof, or an officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or of

both Houses thereof, asks, accepts, or receives any money, or any check, order, contract, promise, undertaking, obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of anything of value, with intent to have his decision or action on any question, matter, cause or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, influenced thereby shall be fined not more than three times the amount of such money or value of such thing or imprisoned not more than three years, or both; and shall forfeit his office or place and be disqualified from holding any office or honor, trust or profit under the United States.

This section shall not apply to violations of section 213 of this title."

STATEMENT

Jurisdiction was had in this case in the United States District Court for the Eastern District of South Carolina, Columbia Division, upon an indictment charging violation of 18 U. S. C., Sections 202 and 371.

Petitioner was tried and convicted by a jury on counts 5, 6, 7, 8, 9 and 11 of the indictment. The sentence of the Court, as to all counts except the 5th, was suspended upon five years probation; on count 5 the petitioner was sentenced to serve a period of one year and to pay a fine of Two Hundred Dollars. Count 5 charged that on or about June 5, 1953, the petitioner and a co-defendant solicited and asked money from one Ken Mason for the purpose of and with the intent to influence thereby their official decisions and actions in the regulation and control of the solicitation and sale of life insurance to military personnel at Fort Jackson, South Carolina.

Motion for judgment of acquittal on the ground that the facts did not warrant a conviction since the petitioner had no official authority over or official duty in connection

with the subject matter of the decision sought to be influenced was overruled. Motion for new trial on the ground that the evidence did not sustain the verdict of the jury was likewise denied.

The evidence was uncontradicted that the Adjutant General at Fort Jackson, South Carolina advised the Commanding General on matters pertaining to the regulation of the solicitation and sale of insurance to military personnel at such Post; that the Insurance Officer directly in charge of such activities was under the control of the Adjutant General; that the petitioner was Adjutant General at Fort Jackson from August 31, 1951 until January 14, 1953; and that on this date petitioner was relieved of all duties, placed on a non-duty or unassigned status to await trial by Court Martial for acts completely disconnected with this case.

It is further undisputed that from January 14, 1953 until petitioner's retirement from the Army on November 30, 1953, he had no connection with the Adjutant General's office and was totally removed from any duties that might remotely have been connected with the promulgation or enforcement of regulations pertaining to the sale of life insurance to military personnel.

In June, 1953, the petitioner was given Two Thousand Five Hundred Dollars by one Ken Mason who thought petitioner was Colonel Russell, the then Adjutant General of Fort Jackson. Later when Mason discovered that the person to whom he had given this sum of money was not Colonel Russell, criminal proceedings were brought against petitioner and his co-defendant.

Petitioner's co-defendant plead guilty to all counts of the indictment. Petitioner was convicted under counts 5, 6, 7, 8 and 9 with having solicited and accepted money to

influence the relaxing of the Post regulations regarding the solicitation and sale of life insurance to military personnel.

After petitioner's motion for a new trial in the District Court was denied, he appealed to the United States Court of Appeals for the Fourth Circuit which affirmed the judgment of the District Court.

No question is raised herein concerning petitioner's conviction under count 11 charging conspiracy under Title 18 U. S. C., Section 371.

REASONS FOR GRANTING THE WRIT

1. **Existing conflict among the circuits on the issues presented:** The primary issue in this case is whether an officer of the United States Army in an unassigned status with no official duties to perform and having no authority to render any official decision can be convicted under Title 18 U. S. C., Section 202 of soliciting or accepting money to influence an official decision then pending or which may by law be brought before an officer in his official capacity.

On this issue clearly there is an existing conflict among the circuits. This conflict was conceded by the Court below (Appendix, *infra*, P. 17) when the court stated:

> "It might be noted that in only one of the cases cited by Wilson's counsel, *Blunden v. United States*, 169 F. (2d) 991, was the conviction of bribery reversed, and, as to that case, we said in *Hurley v. United States*, 192 F. (2d) 297, 300: 'We are not unmindful of *Blunden v. United States*, 6 Cir., 169 F. (2d) 991, but insofar as that Decision is in conflict with our decision here, we think it incorrect.'"

Also in conflict with the decision of the Court below are the following:

Zambroni v. United States (C. A., 6), 170 F. (2d) 272;

Krogmann v. United States (C. A., 6), 225 F. (2d) 220;

United States v. Seagraves (U. S., D. C. for Guam), 100 F. Sup. 424.

The allowance of the petition in the instant case would afford this Court the opportunity to review the problems involved herein in their entirety and resolve the existing conflicts among the circuits.

2. **The Court below was in error in predicating its affirmance of petitioner's conviction upon its opinion that petitioner was guilty of aiding and abetting under Title 18 U. S. C., Section 2:** It is interesting to note the language of the Court below wherein in sustaining the conviction of petitioner it stated in its opinion as follows (Appendix, *infra,* P. 18):

> "We think Wilson could clearly be guilty under this statute, even if it were held that he could not be convicted as the primary offender under 18 U. S. C. A., Section 202. * * *
>
> There is more than ample evidence in the record to prove that Wilson aided and abetted Dean in committing bribery and that Dean was fully capable of committing this crime under a strict interpretation of 18 U. S. C. A., Section 202."

Of course, it is clear from the record that the indictment did not charge petitioner with the offense of aiding and abetting, he was not tried for such offense, the question of committing such offense by petitioner was not submitted to the jury and there is no evidence of such offense.

We, therefore, believe that if the petitioner was not guilty of violating Title 18 U. S. C., Section 202, the mere fact that the Court below was of the opinion that he was guilty of a violation of Title 18 U. S. C., Section 2 cannot afford a basis for the petitioner's conviction herein.

3. **The action of the court below in affirming the conviction of petitioner is without support in the record:** The Court below predicated its decision upon its finding that

it is immaterial whether the petitioner may not have had actual authority to carry out his commitments under the bribery scheme. The view expressed by the court below that the petitioner, while no longer directly in the chain of supervision of the regulation of insurance sales, was free and able to make any recommendation he might see fit to make to the Commanding General is unrealistic. At the times in question, the petitioner had been convicted by Court Martial and had been relieved of all active duties. It is inconceivable that the Commanding General could or would have been influenced in the slightest by an officer under such a cloud and occupying such a status.

The basis of the crime of bribery, as defined in 18 U. S. C., Section 202, is the existence of a decision pending before the bribee in his official capacity, or the existence of a decision that might lawfully be brought before him in his official capacity. The influencing of such a decision is the object of the passage of money. In this case there was no decision pending; no decision could have been lawfully made by the petitioner and the petitioner did not in fact receive the money for the purpose of influencing any decision. The petitioner here misrepresented his identity to the bribor. While this action was reprehensible and does constitute an offense other than the offense for which petitioner was convicted, the misrepresentation of his identity is further evidence that the bribor knew that the petitioner himself had no authority to make or influence a decision and for this reason intended to bribe the person who actually had such authority.

As the Court of Appeals for the Sixth Circuit stated in *Blunden et al. v. United States, supra,* p. 994:

> "To the same effect is *Browne v. United States,* 6 Cir., 290 F. 870, and *Cohen v. United States,* 6 Cir., 294 F. 488, which two cases also held that in order for the offense to exist under the statute it was necessary

that the person offering the bribe believe that the employee had the necessary authority and also **that the employee possess the actual authority to act or assist in the matter.** * * *'' (Emphasis added.)

The Court below, following its decision in the case of *Hurley v. United States,* 192 F. (2d) 297, construing Section 201 of Title 18 U. S. C., rejected the rule established by the Court of Appeals for the 6th Circuit and held that the bribor was guilty if it were shown that the bribee was an officer of the United States and that the bribe was given with the intent to influence him to commit or aid in committing any fraud on the United States or with the intent to induce him to do or commit any act in violation of his lawful duty. The court thus held that under Section 201 the bribor could be guilty of the crime of bribery regardless of whether the bribee was acting in his official capacity. However, the court below in the instant case disregarded the language of Section 202 of 18 U. S. C. and sought to impose upon the petitioner the broader language used in Section 201.

It is submitted that the Court below in affirming the District Court and holding that the petitioner violated 18 U. S. C. Section 202, despite his lack of authority or duties in connection with the subject matter of the bribe, improperly extended the language of the statute.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioner.

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DECISION OF UNITED STATES COURT OF APPEALS FOR FOURTH CIRCUIT

Before PARKER, Chief Judge, and SOPER and DOBIE, Circuit Judges.

FRANK E. JORDAN, JR., for Appellant; and IRVINE F. BELSER, JR., Assistant United States Attorney, (N. WELCH MORRISETTE, JR., United States Attorney, on brief) for Appellee.

DOBIE, Circuit Judge:

Ernest P. Wilson, with Everett L. Dean, was indicted under Sections 202 and 371 of Title 18 U. S. C. A. The indictment contained eleven counts, ten pertaining to the substantive offenses of soliciting and accepting bribes and the eleventh count being one of conspiracy. The co-defendant, Dean, entered a plea of guilty to all counts of the indictment. Wilson plead not guilty. Counts One, Two, Three, and Four of the indictment were not applicable to Wilson and were not at issue in the trial.

Although Dean and Wilson were charged in the same indictment, they were tried separately. The case was first called for arraignment in February, 1955. Wilson obtained a continuance of the trial as to him at that time, however, because of a recent change of counsel. Dean entered a plea of not guilty, and the case as to him proceeded to trial. After two and a half days of trial, and just as the Government was about to commence its reply evidence, Dean withdrew his plea of not guilty and entered a plea of guilty to all eleven counts of the indictment. Wilson was tried at the next term of court, in June, 1955. Count 10 (concerning the acceptance of certain money on June 18, 1953) was voluntarily withdrawn by the Government.

After the jury returned a verdict of guilty as to all counts submitted to it, Judge Timmerman sentenced Wilson to imprisonment for a period of one year and a fine of $200.00 on each of counts 5, 6, 7, 8, and 9, and to imprisonment for three years and a fine of $200.00 on count 11, the sentences on all counts except number 5 to run concurrently, and to be suspended on five years probation. Wilson, who has remained at liberty under bond since the time of the trial, has duly appealed to us.

These questions are involved in this appeal:

(1) Whether Wilson's alleged temporary lack of any specific duties or authority in connection with the subject matter of the bribe made it legally impossible for him to have committed the crime of bribery?

(2) Could Wilson stand properly convicted under the indictment in this case and 18 U. S. C. A. §2 as having aided and abetted the co-defendant Dean in committing the crime of bribery?

(3) Regardless of his own ability to commit the crime of bribery, was Wilson properly convicted of conspiring with co-defendant Dean and others for Dean to commit the crime of bribery?

(4) Was there reversible error in the instructions of the District Judge?

We think all these questions must be answered adversely to Wilson. The judgment of the District Court will, accordingly, be affirmed.

After enlisting in the Army in 1933 and being commissioned as an officer in the Adjutant General's Corps in 1942, Wilson was assigned in June, 1951, as Assistant Adjutant General of Fort Jackson, South Carolina, and in August, 1951, as Adjutant General of that post. He held that assignment until January 14, 1953. At that time, he was relieved as Adjutant General to await trial by general court martial on charges of dishonorably passing bad checks and failing to pay his debts to various civilians and military subordinates. From that date until his trial in May, 1953, he had no specific duties except to prepare his defense to the charges against him. He was convicted on one bad check charge and sentenced to forfeiture of pay in the total amount of $1,200.00. He was acquitted on the rest of the charges. Sometime after his trial, he was assigned to assist with the Reserve training program conducted at Fort Jackson during the summer period. In September, 1953, he was assigned as Assistant G-3 (Operations and Training) of Fort Jackson. During all of this time he remained assigned to the same headquarters unit, as an officer on the staff of the Commanding General. In November, 1953, he became eligible for retirement and retired from active duty.

In February, 1953, just after Wilson had been relieved as Adjutant General and while Dean was still Insurance Officer, an insurance salesman named Kenneth Mason, who had sold insurance at Fort Jackson and other military bases in the past, came to Columbia, South Carolina, to check on the situation at Fort Jackson. Not long after his arrival he received a phone call from an unidentified person who suggested that if he wanted to sell insurance at Fort Jackson, he should get in touch with Captain Dean and that Captain Dean might want some money for "little extra favors, so to speak." There was testimony from Captain Dean which might have warranted the jury in concluding that the unidentified caller was Wilson. Mason made connections with Dean and during the next three days paid him $2,800.00. In return for this money, Mason and a crew of salesmen whom he was to assemble, were to be allowed to solicit and sell life insurance to military personnel, including trainees, at Fort Jackson, and the applicable regulations were to be sufficiently relaxed or liberally administered so as to make this possible.

Mason immediately set about collecting his crew and within the next few days had assembled some 6 or 7 salesmen at Fort Jackson. Dean in due course issued permits to Mason and his crew. No changes were made in the regulations, however, and after waiting around several weeks the assembled salesmen gradually drifted back to their former places of business. Dean continued to give Mason a series of excuses, however, such as difficulties with his military superiors, new regulations from higher headquarters, etc., for his failure to perform his part of the bargain. Late in May, Dean, at the request of Wilson, made arrangements for Mason to meet Wilson. During the meeting, Wilson represented himself to be Colonel Raymond H. Russell, the new Adjutant General, and informed Mason that unless Mason paid him $4,000.00, the deal was off and Mason would not be permitted to sell insurance at Fort Jackson. Mason accordingly raised the money by borrowing on his automobile and furniture. According to Mason's testimony, he made payments of $2,500.00 and $1,100.00 directly to Wilson. The other $400.00 was left with Dean

by Mason to be delivered to Wilson. During all his dealings with Wilson, Mason believed Wilson to be the Adjutant General at Fort Jackson. Mason ultimately became dissatisfied with the way things were going, and brought suit to recover the $6,800.00 he had paid. This resulted in disclosure of the bribery scheme and ultimately in the instant criminal proceedings.

The answer to the first question with which we are concerned, Wilson's guilt under the bribery counts of the indictment (counts 5, 6, 7, 8, and 9), depends upon the proper interpretation and application of the statute upon which these counts were based. We set out this statute in full:

"Title 18 U. S. C. A.

Sec. 202. Acceptance or solicitation by officer or other person.

Whoever, being an officer or employee of, or person acting for or on behalf of the United States, in any official capacity, under or by virtue of the authority of any department or agency thereof, or an officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or of both Houses thereof, asks, accepts, or receives any money, or any check, order, contract, promise, undertaking, obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of anything of value, with intent to have his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, influenced thereby, shall be fined not more than three times the amount of such money or value of such thing or imprisoned not more than three years, or both; and shall forfeit his office or place and be disqualified from holding any office or honor, trust, or profit under the United States.

This section shall not apply to violations of section 213 of this title."

If this statute be viewed solely from the standpoint of grammar and phraseology, it is quite striking how many

broadening words are used in the statute: "in *any* official capacity," "*any* department or agency," "on *any* question, matter, cause, or proceeding," which *may at any time* be pending, "which *may* by law be brought before him." Consider the number of disjunctive or alternative persons, actions, or situations referred to: "an officer *or* employee of, *or* person acting for or on behalf of the United States," "any department *or* agency," "decision *or* action," "any question, matter, cause *or proceeding,* which may at any time be pending, or which may by law be brought before him," "in his official capacity, *or* in his place of trust *or* profit." There is no verbal requirement that the matter be pending before the official at the time of the bribe. It is sufficient if it "may *at any time* be pending," or if it "*may* by law be brought before him" at some time in the future.

Certainly, in the face of such sweeping language and the purpose it was designed to accomplish, we find no reason to find any intent on the part of Congress that the statute must be narrowly construed, to exclude any person or any conduct fairly within the broad statutory ambit. To this statute, (and its companion, 18 U. S. C. A. §201), the federal courts have properly given an extremely liberal interpretation.

Thus in *United States v. Birdsall,* 233 U. S. 223, the recommendations for clemency (for which the bribe was accepted) were not a part of the prescribed duties of the agents in the Bureau of Indian Affairs. Said Mr. Justice (afterwards Chief Justice) Hughes (233 U. S. at page 230): "Every action that is within the range of official duty comes within the purview of these sections. There was thus a legislative basis * * * for the charge in the present cases, if the action sought to be influenced was official action."

The Government quite properly relies on our own decision in *Hurley v. United States,* 192 F. (2d) 297, where we were dealing with 18 U. S. C. A. §201, which contains language quite similar to that now before us in 18 U. S. C. A. §202. There the defendant Hurley, who feared that he was about to be drafted into the military service, paid $450.00 to one Nichols to keep him out. Nichols was a sergeant in the Air Force and in charge of the men being

processed at the induction center. He "had nothing to do with the actual physical examination nor could he make any recommendation as to whether a prospective inductee should be accepted or rejected for military service" (192 F. (2d) 299), and could not legally keep a man out of military service. In that case, we said (192 F. (2d) at page 300): "When the bribee is an officer of the United States, there is no necessity to show that he was acting in an official capacity, in order to make out a case under 18 U. S. C. A. §201."

In *Canella v. United States,* 157 F. (2d) 470, some of the actions involved in the conspiracy to solicit and accept bribes were entirely outside the duties of Canella, a Regular Army Colonel, as Quartermaster of the Santa Ana Army Air Base. Said Circuit Judge Orr (157 F. (2d) at page 481):

> "Canella apparently overlooks the fact that whenever officers of the United States army take any action whatever in regard to the army their official duties are involved. The United States is entitled to army officers who do not corruptly sell their recommendations to anyone on any subject."

See, also, *United States v. Holmes,* 168 F. (2d) 888, in which the defendant had already turned in to his superior a report of the irregular sales, so that the matter was thereafter beyond his authority or control; *Cohen v. United States,* 144 F. (2d) 984, cert. denied 323 U. S. 797, in which the conviction of both defendants was affirmed, over the defendants' objections that the local board had no jurisdiction to recommend furlough for a person already in the military service, that such a recommendation had no relation to Cohen's duties as appeal agent, and that Cohen was not connected with the matter in any official status; *Whitney v. United States,* 99 F. (2d) 327, where the defendant's conviction for soliciting and accepting bribes for recommending approval of sales of tombstones for Indians out of restricted funds was upheld, even though the evidence showed that the defendant's duties as senior clerk in an Indian agency were purely routine and confined to assembling the necessary data for the submission of bids and

that he had no authority to make any decision in the matter, this being made by the Department of the Interior in Washington, after recommendation by the agency superintendent.

See, too, *Daniels v. United States*, 17 F. (2d) 339, cert. denied 274 U. S. 744; *McGrath v. United States*, 275 Fed. 294, dismissed per curiam 260 U. S. 709; *Sears v. United States*, 264 Fed. 257, 261; *Sharp v. United States*, 138 Fed. 878.

We have considered the cases cited by counsel for Wilson. These cases, we think, against the impressive line of authority we have cited, in no way militate against the conclusion we have reached that, at the times and under the circumstances here involved, the status and capacity of Wilson clearly brought him within the terms of 18 U. S. C. A. §202. It might be noted that in only one of the cases cited by Wilson's counsel, *Blunden v. United States*, 169 F. (2d) 991, was the conviction of bribery reversed, and, as to that case, we said in *Hurley v. United States*, 192 F. (2d) 297, 300: "We are not unmindful of *Blunden v. United States*, 6 Cir., 169 F. (2d) 991, but insofar as that decision is in conflict with our decision here, we think it incorrect."

At the times vital herein, Wilson was still an officer of relatively high rank on active duty with the Army and stationed at Fort Jackson. For more than a year and a half before the incidents with which we are here concerned, he had played an active role in the very matter which Mason now wished to have influenced. He personally knew and was known to the other persons concerned in the regulation of the sale of insurance—the Commanding General, the Post Insurance Officer, the other staff sections involved, many of the insurance companies and agents themselves. He was still on the staff of the Commanding General and assigned to the same headquarters unit as he had been all along. He was a close personal friend of the current Insurance Officer, Captain Dean. He admitted that during the period after his relief as Adjutant General he had made numerous telephone calls to Dean, and the evidence shows that he worked with Dean in setting up the bribery scheme in question. He still had the same access to the Commanding General, In-

surance Officer and other staff sections he had had as Adjutant General.

Even though at the time herein involved, Wilson was no longer directly in the chain of supervision of the regulation of insurance sales, he was free and able to make any recommendation he might see fit to make to the Commending General or to his friend Dean or to any other officer Regardless of his actual authority, it was still within his practical power to influence the regulation of insurance sales as it had formerly been, particularly with the illegal assistance of his co-conspirator Dean as Post Insurance Officer. It was at least possible that he might be reassigned as Adjutant General, or to some position from which he could bring his influence to bear upon the regulation of insurance sales within the period of time contemplated by the briber Mason.

On these facts, we think, under the cited cases. Wilson clearly came within the group of persons who are covered by the terms of 18 U. S. C. A. §202. It is immaterial either that he may not have had actual authority to carry out his commitments under the bribery scheme, or that he may have taken no affirmative action to perform his part of his corrupt bargain.

18 U. S. C. A. §2 provides:

"*Principals.*

(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

(b) Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such."

We think Wilson could clearly be guilty under this statute, even if it were held that he could not be convicted as the primary offender under 18 U. S. C. A. §202. It is well settled that a husband who cannot be convicted as a first degree principal in the rape of his wife by virtue of the consent to sexual intercourse given upon marriage, may yet be guilty as an accessory before the fact or even as a second

degree principal when the rape of his wife is actually perpetrated by another man.

There is more than ample evidence in the record to prove that Wilson aided and abetted Dean in committing bribery and that Dean was fully capable of committing this crime under a strict interpretation of 18 U. S. C. A. §202. Dean was the Post Insurance Officer during the whole period concerned in the bribery and had the subject matter of the bribe within his specific shere of activity and under his direct supervision. Dean has admitted, by plea of guilty and his testimony in this case, his own guilt. Mason testified that shortly after he arrived in Columbia, on February 9, 1953, he was put in touch with Dean through a telephone call from some unidentified person other than Dean, and Dean testified that Wilson told him that Mason would be out to see him, Dean. The jury might well have inferred that this unidentified person was Wilson and that Wilson thought up the bribery scheme in the first place. Mason also testified that his meetings with Wilson were arranged through the medium of Dean as an intermediary. The telephone conversations between Mason and Dean and between Mason and Wilson recorded by Mason and introduced in evidence as Government's Exhibit No. 7, are full of references to both Dean and Wilson. Dean and Wilson were on close personal terms and were in frequent communication even after Wilson's relief as Adjutant General. Dean and Wilson apparently worked closely together in this whole bribery scheme.

We think it is clear, too, from a reading of Counts 5, 6, 7, 8, 9, 10 of the indictment that Wilson was clearly advised of this charge against him under 18 U. S. C. A. §2.

Equally clear is it, we think, that under a proper indictment, after a fair trial, upon adequate evidence, Wilson has been convicted of conspiracy under 18 U. S. C. A. §371. One who is himself legally incapable of committing, as the primary offender, a substantive crime, may yet be guilty of a conspiracy to commit this crime; *Cohen v. United States*, 144 F. (2d) 984, cert. denied 323 U. S. 797; *Culp v. United States*, 131 F. (2d) 93; *Downs v. United States*, 3 F. (2d) 855, cert. denied 268 U. S. 689. Conspiracy to commit a

crime is a different offense from the crime that is the object of the conspiracy. *American Tobacco Co. v. United States,* 328 U. S. 781; *Blumenthal v. United States,* 158 F. (2d) 883, cert. denied 331 U. S. 799, affirmed 332 U. S. 539; *Pinkerton v. United States,* 328 U. S. 640.

There is no doubt that Dean, as Post Insurance Officer could commit the crime of bribery. And, from what has already been stated, it is obvious that all the elements of the crime of conspiracy by Wilson with Dean to commit bribery were adequately proved by the record.

In the light of what has been hitherto set out, we find no reversible error in the District Judge's instructions to the jury or in his conduct throughout the trial.

The judgment of the District Court is affirmed.

Affirmed.

No. 814

FILED
MAR 30 1956
HAROLD B. WILLEY, Cl

BRIEF AND APPENDIX FOR APPELLANT

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 7115

ERNEST P. WILSON, APPELLANT,

versus

UNITED STATES OF AMERICA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF SOUTH CAROLINA
AT COLUMBIA, S. C.

FILED

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United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 7115

ERNEST P. WILSON, APPELLANT,

versus

UNITED STATES OF AMERICA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA AT COLUMBIA, S. C.

STATEMENT OF THE CASE

The appellant, along with one Everett L. Dean, was indicted under Sections 202 and 371 of Title 18 U. S. C. A. The indictment contained eleven counts, ten pertaining to the substantive offenses of soliciting and accepting bribes and the eleventh count being one of conspiracy. The co-defendant, Dean, entered a plea of guilty to all counts of the indictment. The appellant plead not guilty. Counts One, Two, Three, and Four of the indictment were not applicable to this appellant and were not at issue in the trial. The District Judge granted the defendant's motion for a Judg-

ment of Acquittal as to Count Ten but submitted Counts Five, Six, Seven, Eight, Nine and Eleven to the jury. The defendant was convicted on all of these counts and was sentenced to serve a period of one year in a federal institution and to remain on probation for a period of five years thereafter.

QUESTIONS PRESENTED

The questions presented on this appeal are:

(1) Did his Honor, the District Judge, err in refusing to grant the appellant's motion for a Judgment of Acquittal?

(2) Did his Honor, the District Judge, err in refusing to permit the jury to consider the question of the defendant's lack of official capacity so as to remove him from the class of persons indictable under Section 202 of Title 18 U. S. C. A.; and did His Honor further err in instructing the jury that this was not an essential element of the offense?

FACTS

The appellant was, prior to November, 1953, a Lieutenant Colonel on active duty with the United States Army. For some months prior to January 14, 1953, the appellant held the position of Adjutant General of Fort Jackson, South Carolina. During this period his codefendant, Everett L. Dean, held the rank of Captain in the United States Army and was assigned to the job of Insurance Officer working directly under the command of the appellant. On January 14, 1953, the appellant was relieved of his duties as Adjutant General of Fort Jackson and was placed on a non duty status awaiting a Court Martial for acts completely disconnected with any offense alleged in this case. In the month of February, 1953, the codefendant, Dean, entered into some agreements with one Kenneth Mason, an insurance salesman from Birmingham, Alabama. During this

month the said Mason delivered various sums of money to the said Dean for the purpose of influencing Dean to alter certain insurance regulations then existing at Fort Jackson. For the acceptance of this money Dean plead guilty to the charges preferred against him.

In May of 1953 the appellant was tried by an Army Court Martial and was acquitted on all counts except one and for this was given a fine by the army. The appellant was to be eligible to retire from the army in November, 1953. From May until November the appellant had no connection with the adjutant general's office and was totally removed from any duties that might remotely have been connected with the promulgation of regulations pertaining to the sale of life insurance to military personnel.

In June, 1953, the appellant was identified as the person to whom Mason delivered certain other sums of money, thinking him to be a Colonel Russell, the then adjutant general of Fort Jackson. Mason had apparently been informed by Dean that to have the regulations changed to Mason's satisfaction that the adjacent general would have to be paid off. Mason complied with this request and delivered money to the person later identified to be the appellant. Many months after the appellant's retirement from the army, Mason discovered his error and criminal proceedings were brought against Dean and the appellant.

ARGUMENT

The appeal primarily involves the construction of a criminal statute under which this appellant was indicted, tried, and convicted in the District Court of the United States. Counts Five, Six, Seven, Eight, and Nine of the Indictment, under which the appellant was convicted, pertain to violations of Section 202 of Title 18 U. S. C. A. It is the appellant's contention that the Government failed to

prove the essential elements of the offense as set forth in the statute.

The first part of the statute defines the persons who may violate its terms. These are defined as certain officers, employees, etc., of the Government. There is no question here that the appellant fell within this category as he was an officer of the United States Army at the time of the alleged offense. The second part of the statute defines the acts that shall constitute the offense for persons falling within the above category. This is set forth as one who "asks, accepts, or receives any money, * * * with the intent to have his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, influenced thereby * * *."

The counts of the indictment under which this appellant was convicted set out the wording of the statute quoted above and further defines the decision allegedly sought to be influenced, "that is to say, that the said defendants, as officers of the United States Army, did solicit and ask from Ken Mason money, by cash, check, or otherwise, for the purpose of and with the intent to influence thereby their official decisions and actions in the regulation and control of the solicitation of life insurance to military personnel at the said Fort Jackson so as to facilitate such solicitation and sale by the said Ken Mason and others."

It is the appellant's contention that, for the Government to sustain a conviction on the indictment presented, it must be proven not only that the appellant was an officer of the United States and that he solicited or received money, but also that it was received for the purpose of influencing an official decision then pending, or that might be lawfully brought before him.

The facts are uncontradicted that, on June 5, 1953, June 17, 1953 and June 18, 1953, the appellant held no position with the United States in which any decision pertaining to the regulation of insurance at Fort Jackson, S. C., was before him or could lawfully be brought before him. Major Shirley, a witness for the Government, outlined in detail the chain of command existing at Fort Jackson at that time in so far as insurance was concerned. He specifically stated that the appellant was not in that chain of command and that there was no way for any matter pertaining to the sale or regulation of life insurance to ever be brought before him. (Appendix, page 25.)

The Courts have been in almost complete agreement on the fact that the basis of the crime of bribery, as defined in Section 202, is the existence of a decision pending before the bribee in his official capacity, or that there is a decision that might lawfully be brought before him in his official capacity, and the influencing of this decision was the object of the passage of the money. In this case there was no decision pending, there never could have lawfully been a decision pending, and the appellant never conceived that, in accepting the money, that it was for the purpose of influencing any decision.

In the case of *Fall v. U. S.* (49 F. (2d) 506), the defendant appealed from a bribery conviction on the grounds that the decisions which were influenced by the passage of money were decisions that were later declared to be illegal ones. The Court upheld the conviction on the grounds that a person acting in a *de facto* official capacity was as guilty as one acting in a *de jure* official capacity, but the Court said, "If he accepted money to influence his action all of the elements of bribery are present." Thus if the influencing of the decision is not present all of the elements of the offense have not been met.

In *Harris v. U. S.* (8 F. (2d) 841), the Court said "the criminality of the act of the accused in receiving money from a law violator was dependent on the accused having the intent to be influenced thereby in his official conduct."

In *U. S. v. Bordonara,* (253 F. 477), the Court said, "It is essentially necessary in this case for the government to show that the defendants committed an act to influence official action on the part of Murrin, or to influence him in the performance of any duty that he was required to perform by the authority of his appointment to office."

In the case of *Blunden v. U. S.* 169 F. (2d) 991, the Court held "The crux of the offense is the intent to influence an official decision. The statute requires that the employee be acting for the Government in an official function and that the matter in which his decision is to be influenced be 'before him in his official capacity' ". We realize that this Court had differed in part with the *Blunden case,* but as will be pointed out later the difference arose out of the construction of a different statute than the one now before the Court and under the facts of this case it appears that the *Blunden case* would serve as a proper construction of Section 202.

It therefore appears that throughout the decisions the Courts have held that there must be a duty to make a decision that is sought to be influenced before the crime of bribery will lie.

The Government has contended that it makes no difference whether the bribee performed the acts for which he was bribed and the District Judge so charged the jury. With this we agree partially. If the decision was before the bribee or could be brought before the bribee in the performance of his official duties and he accepted money for the purpose of influencing that decision, then it does not matter whether the decision was influenced or not, the

elements of the crime are there. But the disagreement comes in that we contend that first the decision must be there or could be brought there. If this requirement of the statute is not met the essential element of the crime is lacking. In the case of *Canella v. U. S.*, 63 Fed. Supp. 377 and 157 F. (2d) 470, the Court there held that it made no difference whether or not the bribee actually did that which he was bribed to do in so long as he was bribed to do an act which was "within the scope of the duties of his official capacity."

There is the further fact in this case in which the bribor was misinformed as to the identity of the person to whom he delivered the money. He actually made a delivery to a person whom he thought to be the adjutant general of the Fort and who could have accomplished the mission of the bribe. Actually the appellant here had misrepresented his identity to the bribor. This act of the appellant may constitute some other offense but we fail to see wherein it alters the facts of the crime of bribery. The undisputed fact still remains that this appellant had no authority, no decision, no future decision pending before him. The fact that he misrepresented his identity is further evidence that the bribor intended to bribe a man who could alter the insurance regulations and that the appellant knew that he would have to misrepresent his identity in order to receive the money for he well knew what the bribor wished accomplished and well knew that he could not nor would he ever be able to accomplish it for him. The case of *Cohen v. U. S.*, 294 Fed. 488, states, "Often, if not usually, he cannot have absolute knowledge. He offers the bribe because he supposes the one to whom he offers it has the necessary official function; and if his supposition is right, he commits the offense denounced by the statute." Conversely if his supposition is wrong an essential element of the offense is

missing. This misrepresentation may constitute other offenses. But the mere doing of an act that constitutes an offense does not warrant the Government in selecting at random an offense to its own liking and then try to make the square facts fit into the round hole.

The Government's major contention as to the guilt of the appellant revolved around the decision of this Court in the case of *Hurley v. United States* in 192 F. (2d) 297. In this case this Court partially disagreed with the *Blunden case* cited above. Despite the fact that the Government relied almost wholly on the wording of this case to sustain the conviction, it is the appellant's opinion that this is perhaps the strongest case in its defense. The facts in this case and those in the *Hurley case* have many similarities but they have one major difference and on that difference we think that the language of the *Hurley case* would warrant a reversal of the conviction on this appeal. The major difference is that in the *Hurley case* this Court was called upon to construe Section 201, Title 18 of the U. S. C. A. while this case involves the construction of Section 202 of the same title.

Section 201 of the Criminal Code was enacted by Congress for the purpose of making it an offense for a person outside of the Government service to, by the method of bribery, wrongfully influence the conduct of an official of the Government. Section 202 was also enacted by Congress for the purpose of preventing the official of the Government from seeking or receiving funds for the purpose of having certain of his conduct influenced. Congress, however, saw fit, in enacting these two statutes, to use different words in describing the two distinct offenses. The Government made a strong effort to say that the two statutes should be construed together and any change in the wording of one should be implied into the other. This, we con-

tend, is entirely incorrect. Here we have two distinct offenses described in two separate statutes. A person could not be guilty of both offenses and therefore when he is indicted on one of them the government must prove every element of the offense set forth in the statute and the Courts should place a strict interpretation upon the wording of the statute. If we eliminate the portions of the statute which describes the persons subject to its terms, the crux of the two statutes are:

> "Section 201. Anyone who offers anything of value to a government official 'with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty.' Therefore a person may be guilty under this statute if he offers money to a government official for anyone of three things; (1) to influence a decision that is before him or that may be brought before him, (2) to commit, or aid in the committing, or allow a fraud against the United States; (3) to do or omit to do any act in violation of his lawful duty.
>
> "Section 202: Any government official who solicits or accepts anything of value 'with intent to have his decision or action on any question, matter, cause, or proceeding before him in his official capacity, or in his place of trust or profit, influenced thereby'. Therefore to be guilty under this statute the money must be accepted for one reason only—the influencing of a decision pending or that might be pending."

In the *Hurley case* this Court, in construing Section 201 said, "It is sufficient if it is shown that the bribee was an officer of the United States and that the bribe was

given 'with the intent to influence him to commit or aid in committing any fraud on the United States' or with intent 'to induce him to do or omit to do any act in violation of his lawful duty'. It is clear that the bribe here was paid to Nichols with intent to influence him to commit a fraud on the United States and to do and omit to do acts in violation of his lawful duty.

"Under the statute the offerer is forbidden to give money or other things of value with intent to influence the bribee's decision on a matter before him in his official capacity, or to induce him to commit a fraud on the United States or to breach his lawful duty. An offense is shown if the evidence supports a finding that the money was given to influence the bribee to commit a fraud against the United States, or to breach his lawful duty, regardless of whether the money is given to influence a decision before the bribee in his official capacity."

With this opinion the appellant is in full accord because it is construing a statute in which the bribor may be guilty of the crime of bribery by doing any of the things mentioned in the opinion. But in the present case the bribee could not be guilty of the same offense of bribery unless he, too, completely met the statutory requirements set forth in Section 202 which, again, are to have a decision before him influenced.

Therefore we submit to the Court that the appellant was indicted on Counts 5-9 for soliciting money and receiving the same for the purpose of having his decision influenced specifically as to the changing of regulations pertaining to insurance at Fort Jackson, S. C., and the facts are uncontradicted that the decision was not pending before the appellant and could not lawfully have been brought before him and therefore he is not guilty of the crime of bribery as defined in Section 202 of the Criminal Code.

As to the Conspiracy Count under which the appellant was also convicted, we submit that if the Court should hold that the acts of the defendant did not constitute the crime of bribery then the conspiracy likewise falls for want of an offense to base it upon. If the Court should affirm the conviction on the substantive counts then of course the conspiracy would also have to stand. The government, under Count Eleven of the indictment, in fact alleged two conspiracies. One took place in the month of February between Dean and Mason and the end of this conspiracy was concluded with the passage of the money from Mason to Dean. At that time this appellant was not a party to any agreement or arrangement with either of these co-conspirators. The second conspiracy which takes place in the month of June, 1953, between Mason, Dean, and this appellant was based solely on the overt acts numbered 6, 7, 8, 9, 10, 11 in the indictment. If the solicitation and the acceptance of this money by the appellant in June, 1953, did not constitute the crime of bribery then he could not be guilty to conspiring to do that which when done is no crime.

CONCLUSION

We respectfully submit that the conviction of the appellant under Section 202 and Section 371 of Title 18 U. S. C. A. was not warranted by the facts and the Judgment and Sentence of the District Court be reversed and that Judgment of Acquittal be entered for this appellant.

Respectfully submitted,

FRANK E. JORDAN, JR.,
Attorney for the Appellant.

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF SOUTH
CAROLINA. COLUMBIA DIVISION

UNITED STATES OF AMERICA v. EVERETT L. DEAN AND ERNEST P. WILSON	Cr. No. 20235 18 U. S. C. Secs. 202 and 371

The Grand Jury Charges:

That on or about the 10th day of February, 1953, in the County of Richland, in the Eastern District of South Carolina, Everett L. Dean, hereinafter in this count referred to as the defendant, did unlawfully, knowingly, wilfully and feloniously, as an officer and employee of the United States, a department or agency thereof, and being a person acting for and on behalf of the United States in an official capacity, did solicit and ask money, by cash, check, or otherwise, with the intent to have his decision and action on matters, causes and proceedings which were before him, in his official capacity, thereby influenced; that is to say, that the said defendant, as an officer of the United States Army, having the duty of Insurance Officer at Fort Jackson, South Carolina, did solicit and ask from Ken Mason money, by cash, check, or otherwise, for the purpose of and with the intent to influence thereby his official decisions and actions in the regulation and control of the solicitation and sale of life insurance to military personnel at the said Fort Jackson so as to facilitate such solicitation and sale by the said Ken Mason and others.

SECOND COUNT

The Grand Jury Further charges:

That on or about the 10th day of February, 1953, in the County of Richland, in the Eastern District of South Carolina, Everett L. Dean, hereinafter in this count referred to as the defendant, did unlawfully, knowingly, wilfully and feloniously, as an officer and employee of the United States, a department or agency thereof, and being a person acting for and on behalf of the United States in an official capacity, did accept and receive money, by cash, check, or otherwise, with the intent to have his de-

cision and action on matters, causes and proceedings which were before him, in his official capacity, influenced thereby: that is to say, that the said defendant, as an officer of the United States Army, having the duty of Insurance Officer at Fort Jackson, S. C., did accept and receive the sum of Two Thousand Dollars ($2,000.00) from Ken Mason for the purpose of and with the intent to influence thereby his official decisions and actions in the regulation and control of the solicitation and sale of life insurance to military personnel at the said Fort Jackson so as to facilitate such solicitation and sale by the said Ken Mason and others.

THIRD COUNT

The Grand Jury further charges:

That on or about the 12th day of February, 1953, in the County of Richland, in the Eastern District of South Carolina, Everett L. Dean, hereinafter in this count referred to as the defendant, did unlawfully, knowingly, wilfully and feloniously, as an officer and employee of the United States, a department or agency thereof, and being a person acting for and on behalf of the United States in an official capacity, did solicit and ask money, by cash, check, or otherwise, with the intent to have his decision and action on matters, causes and proceedings which were before him, in his official capacity, thereby influenced; that is to say, that the said defendant, as an officer of the United States Army, having the duty of Insurance Officer at Fort Jackson South Carolina, did solicity and ask from Ken Mason money, by cash, check, or otherwise, for the purpose of and with the intent to influence thereby his official decisions and actions in the regulation and control of the solicitation and sale of life insurance to military personnel at the said Fort Jackson so as to facilitate such solicitation and sale by the said Ken Mason and others.

FOURTH COUNT

The Grand Jury further charges:

That on or about the 12th day of February, 1953, in the County of Richland, in the Eastern District of South Carolina, Everett L. Dean, hereinafter in this count referred to as the defendant, did unlawfully, knowingly, wilfully

and feloniously, as an officer and employee of the United States, a department of agency thereof, and being a person acting for and on behalf of the United States in an official capacity, did accept and receive money, by cash, check, or otherwise, with the intent to have his decision and action on matters, causes and proceedings which were before him, in his official capacity, influenced thereby; that is to say, that the said defendant, as an officer of the United States Army, having the duty of Insurance officer at Fort Jackson, S. C., did accept and receive the sum of Eight Hundred Dollars ($800.00) from Ken Mason for the purpose of and with the intent to influence thereby his official decisions and actions in the regulation and control of the solicitation and sale of life insurance to military personnel at the said Fort Jackson so as to facilitate such solicitation and sale by the said Ken Mason and others.

FIFTH COUNT

The Grand Jury further charges:

That on or about the 5th day of June, 1953, in the County of Richland, in the Eastern District of South Carolina, Everett L. Dean and Ernest P. Wilson, hereinafter in this count referred to as the defendants, did unlawfully, knowingly, wilfully and feloniously, as officers and employees of the United States, a department of agency thereof, and being persons acting for and on behalf of the United States in an official capacity, did solicit and and ask money, by cash, check, or otherwise, with the intent to have their decisions and actions on matters, causes and proceedings which were before them, in their official capacity, thereby influenced; that is to say, that the said defendants, as officers of the United States Army, did solicity and ask from Ken Mason money, by cash, check, or otherwise, for the purpose of and with the intent to influence thereby their official decisions and actions in the regulation and control of the solicitation and sale of life insurance to military personnel at the said Fort Jackson so as to facilitate such solicitation and sale by the said Ken Mason and others.

SIXTH COUNT

The Grand Jury further charges:

That on or about the 5th day of June, 1953, in the County of Richland, in the Eastern District of South Carolina, Everett L. Dean and Ernest P. Wilson, hereinafter in this count referred to as the defendants, did unlawfully, knowingly, wilfully and feloniously, as officers and employees of the United States, a department or agency thereof, and being persons acting for and on behalf of the United States in an official capacity, did accept and receive money, by cash, check, or otherwise, with the intent to have their decisions and actions on matters, causes and proceedings which were before them, in their official capacity, influenced thereby; that is to say, that the said defendants, as officers of the United States Army, did accept and receive the sum of Two Thousand Five Hundred Dollars ($2,500.00) from Ken Mason for the purpose of and with the intent to influence thereby their official decisions and actions in the regulation and control of the solicitation and sale of life insurance to military personnel at the said Fort Jackson so as to facilitate such solicitation and sale by the said Ken Mason and others.

SEVENTH COUNT

The Grand Jury further charges:

That on or about the 17th day of June, 1953, in the County of Richland, in the Eastern District of South Carolina, Everett L. Dean and Ernest P. Wilson, hereinafter in this count referred to as the defendants, did unlawfully, knowingly, wilfully and feloniously, as officers and employees of the United States, a department or agency thereof, and being persons acting for and on behalf of the United States in an official capacity, did solicit and ask money, by cash, check, or otherwise, with the intent to have their decisions and actions on matters, causes and proceedings which were before them in their official capacity, thereby influenced that is to say, that the said defendants, as officers of the United States Army, did solicit and ask from Ken Mason money, by cash, check, or otherwise, for the purpose of and with the intent to

influence thereby their official decisions and actions in the regulation and control of the solicitation and sale of life insurance to military personnel at the said Fort Jackson so as to facilitate such solicitation and sale by the said Ken Mason and others.

EIGHTH COUNT

The Grand Jury further charges:

That on or about the 17th day of June, 1953, in the County of Richland, in the Eastern District of South Carolina, Everett L. Dean and Ernest P. Wilson, hereinafter in this count referred to as the defendants, did unlawfully, knowingly, wilfully and feloniously, as officers and employees of the United States, a department or agency thereof, and being persons acting for and on behalf of the United States in an official capacity, did accept and receive money, by cash, check, or otherwise, with the intent to have their decisions and actions on matters, causes and proceedings which were before them in their official capacity, influenced thereby; that is to say, that the said defendants, as officers of the United States Army, did accept and receive the sum of One Thousand One Hundred Dollars ($1,100.00) from Ken Mason for the purpose of and with the intent to influence thereby their official decisions and actions in the regulation and control of the solicitation and sale of life insurance to military personnel at the said Fort Jackson so as to facilitate such solicitation and sale by the said Ken Mason and others.

NINTH COUNT

The Grand Jury further charges:

That on or about the 18th day of June, 1953, in the County of Richland, in the Eastern District of South Carolina, Everett L. Dean and Ernest P. Wilson, hereinafter in this count referred to as the defendants, did unlawfully, knowingly, wilfully and feloniously, as officers and employees of the United States, a department or agency thereof, and being persons acting for and on behalf of the United States in an official capacity, did solicit and ask money, by cash, check or otherwise, with the intent to have their decisions and actions on matters, causes and proceedings

which were before them, in their official capacity, thereby influenced; that is to say, that the said defendants as officers of the United States Army, did solicit and ask from Ken Mason money, by cash, check, or otherwise, for the purpose of and with the intent to influence thereby their official decisions and actions in the regulation and control of the solicitation and sale of life insurance to military personnel at the said Fort Jackson so as to facilitate such solicitation and sale by the said Ken Mason and others.

TENTH COUNT

The Grand Jury further charges:

That on or about the 18th day of June, 1953, in the County of Richland, in the Eastern District of South Carolina, Everett L. Dean and Ernest P. Wilson, hereinafter in this count referred to as the defendants, did unlawfully, knowingly, wilfully and feloniously, as officers and employees of the United States, a department or agency thereof, and being persons acting for and on behalf of the United States in an official capacity, did accept and receive money, by cash, check, or otherwise, with the intent to have their decisions and actions on matters, causes and proceedings which were before them, in their official capacity, influenced thereby; that is to say, that the said defendants, as officers of the United States Army, did accept and receive the sum of Four Hundred Dollars ($400.00) from Ken Mason for the purpose of and with the intent to influence thereby their official decisions and actions in the regulation and control of the solicitation and sale of life insurance to military personnel at the said Fort Jackson so as to facilitate such solicitation and sale by the said Ken Mason and others.

ELEVENTH COUNT

The Grand Jury further charges:

That commencing sometime during the first part of the month of February 1953 in the County of Richland, in the Eastern District of South Carolina, and continuing to and including the middle of August, 1953, Everett L. Dean and Ernest P. Wilson, hereinafter referred to as the defendants, and Ken Mason, hereinafter designated as co-

conspirator not indicted, and divers other persons to the Grand Jurors unknown, did unlawfully, wilfully, knowingly and feloniously conspire, confederate, combine, agree and have tacit understanding among themselves and with one another, in violation of Section 371, Title 18, USC, to commit in the manner, by the means, and to the extent hereinafter shown, certain offenses against the laws of the United States and more specifically Section 202, Title 18, USC, in this:

I. As officers and employees of the United States, a department or agency thereof, and by reason of their official capacity and duties, to solicit and ask for money, by check, cash, or otherwise or things of value, in order to have their decisions and actions on matters, causes and proceedings which were before them influenced thereby.

II. As officers and employees of the United States, a department or agency thereof, and by reason of their official capacity and duties, to accept and receive money, by check, cash, or otherwise, or things of value, in order to have their decisions and actions on matters, causes and proceedings which were before them influenced thereby.

That these defendants, the co-conspirator, and divers other persons to the Grand Jurors unknown, sided, assisted and protected each other in the commission of the aforesaid acts and facilitated the commission of such acts.

That the said defendants, the co-conspirator, and divers other persons to the Grand Jurors unknown, having conspired, confederated, combined and agreed together as aforesaid, and in pursuance of such conspiracy and during its continuance, and to effect the object thereof, committed the following overt acts in the County of Richland and other places within the Eastern District of South Carolina, at the times and places hereinafter set forth, to wit:

OVERT ACTS

1. That on or about the 1st day of February, 1953, co-conspirator Ken Mason contacted defendant Everett L. Dean relative to opening up Fort Jackson, South Carolina to the said Ken Mason and others for the solicitation of insurance.

2. That on or about the 10th day of February, 1953, defendant Everett L. Dean did solicit and ask money and things of value of the said Ken Mason.

3. That on or about the 10th day of February, 1953, defendant Everett L. Dean did accept and receive from his co-conspirator Ken Mason the Sum of $2,000.00.

4. That on or about the 12th day of February, 1953, defendant Everett L. Dean did solicit and ask money and things of value of the said Ken Mason.

5. That on or about the 12th day of February, 1953, the defendant Everett L. Dean did accept and receive from his co-conspirator Ken Mason the sum of $800.00.

6. That on or about the 5th day of June, 1953, the defendants Everett L. Dean and Ernest P. Wilson did solicit and ask money and things of value of the said Ken Mason.

7. That on or about the 5th day of June, 1953, the defendants Everett L. Dean and Ernest P. Wilson did accept and receive from their co-conspirator Ken Mason the sum of $2,500.00.

8. That on or about the 17th day of June, 1953, the defendants Everett L. Dean and Ernest P. Wilson did solicit and ask money and things of value of the said Ken Mason.

9. That on or about the 17th day of June, 1953, the defendants Everett L. Dean and Ernest P. Wilson did accept and receive from their co-conspirator Ken Mason the sum of $1,100.00.

10. That on or about the 18th day of June, 1953, the defendants Everett L. Dean and Ernest P. Wilson did solicit and ask money from things of value of the said Ken Mason.

11. That on or about the 18th day of June, 1953, the defendants Everett L. Dean and Ernest P. Wilson did accept from their co-Conspirator Ken Mason the sum of $400.00.

12. That on various dates in February, 1953, the co-conspirator Ken Mason, having assembled various individuals as a working crew for the solicitation of insurance at Fort Jackson, S. C., did confer with them and advise that the defendant Everett L. Dean was to make the solici-

tation of insurance at Fort Jackson more readily available to the said Ken Mason, his crew and others, and in order to do so, the said co-conspirator Ken Mason did inform these individuals that it would cost approximately $250.00 per agent; that the said individuals with whom said conferences were held are as follows:

JAMES M. MOSIER,
THOMAS E. MOODY,
OLLIE M. BREM,
TEMPLE A. WALL,
WILLIAM E. BREM.

13. That on or about the 17th day of February, 1953, the said Thomas E. Moody paid to co-conspirator Ken Mason the sum of $250.00 for payment to defendant Everett L. Dean or reimbursement for such payment.

14. That on or about the 17th day of February, the said William A. Brem paid to conspirator Ken Mason the sum of $500.00 for payment to defendant Everett L. Dean or reimbursement for such payment, to obtain permission for himself and his brother Ollie M. Brem to solicit and sell insurance at Fort Jackson.

15. That on or about the 7th day of February 1953 defendant Everett L. Dean requested that the Provost Marshal, Fort Jackson, South Carolina, issue a civilian identification car to co-conspirator Ken Mason to authorize the said Ken Mason to enter and leave the said United States Military Reservation so as to solicit and sell insurance to military personnel thereat, which said civilian identification car was thereafter issued to the said Ken Mason.

16. That on or about the 18th day of February, 1953, defendant Everett L. Dean requested that the Provost Marshal, Fort Jackson, South Carolina, issue a civilian identification card to Thomas E. Moody to authorize the said Thomas E. Moody to enter and leave the said United States Military Reservation so as to solicit and sell insurance to military personnel thereat, which said civilian identification card was thereafter issued to the said Thomas E. Moody.

17. That defendant Everett L. Dean supplied to co-conspirator Ken Mason copies of United States Army

memoranda and other documents concerning the solicitation and sale of insurance at Fort Jackson and other military reservations.

A TRUE BILL,
ROGER M. FAIREY,
20 jurors concurring,
1 dissenting.

/s/ N. WELCH MORRISSETTE, JR.,
United States Attorney.

• • •

Major Carl R. Shirley:

Q. (By Mr. Belser) Now, during this period, during the period of January 1953, what were the nature of the duties of the defendant, Colonel Wilson?

A. What date was that, sir?

Q. In January, at the beginning of January, 1953?

A. In January of 1953, to the best of my knowledge, Colonel Wilson was not assigned any specific duty beginning in January.

Q. Well, during the early part of January, '53?

A. He was Adjutant General at Fort Jackson.

Q. He was Adjutant General at Fort Jackson?

A. That is right.

Q. Having been appointed to that position on what date?

A. According to the official orders, which I have seen, 31st of August, 1951.

Q. Now, was there any change in his assignment as Adjutant General made during January, 1953?

A. Yes, he was relieved from the assignment as Adjutant General on 14th January, '53.

Q. Now, between that date and, say, May of 1953, do you know of your own knowledge what the general nature of his duties were without going into any detail?

A. I don't know specifically of any job that he had assigned during that period. He was in a duty unassigned status, to the best of my knowledge.

Q. He had no specific duty during that period?

A. That is right.

Q. He was left free to pursue his own activities?

A. That is rgiht.

Q. All right. Now, what was the next time of duty, following that period of several months to which he was assigned?

A. The next period of duty, he was assigned to the Headquarters Commandant to assist in the coordination of the Reserve Training components that he had . . .

Q. What assignment, just briefly without going into any detail? I just want to cover the period. What were the next duties to which he was assigned?

A. He was assigned duties in September of '53 as Assistant G-3.

Q. Then what was the next change that occurred in his military status.

A. He was ordered to the Transfer Center and subsequently retired from the Army on the 30th of November, '53.

Q. The 30th of November, '53?

A. That is right.

• • •

Q. (By Mr. Belser) Now Major Shirley, would you, without going into any detail, tell us briefly about the situation at Fort Jackson in February of 1953 insofar as it concerns regulations for the control of solicitation and sale of commercial life insurance at Fort Jackson?

A. Well, our memorandum on that was in effect at that time, which was the policy, requiring the insurance agents to solicit applicants for insurance on an appointment basis only with the applicant sending in an invitation to the insurance agent telling that he wants to see him. The commercial insurance agents were required to check in with the insurance officer every two weeks, physically, and the Insurance Officer distributed all the literature that they sent, such as business reply cards, and they were not allowed actually to go around and solicit individuals on an individual basis.

• • •

Q. (By Mr. Jordan) All right, then again to go back to my question—during the period from July of '52 to

January of '53, which was from the date of your entrance into the Adjutant General's Office until Colonel Wilson's relief, what individuals at Fort Jackson could have changed, issued, or altered any insurance regulations?

A. The procedure in effect, they had to be staffed completely. Individuals involved during that period . . . let's see . . .

Q. Just name the office held. I don't care about the man.

A. All right. 19th July after Captain Dean took effect it was Dean, Captain Dean.

Q. Who is Insurance Officer?

A. Who is Insurance Officer. Myself, who was his superior.

Q. All right.

A. And then Colonel Crosby who was the A. G. Executive Officer. I think they went through his desk. I am not sure.

Q. All right.

A. Colonel Wilson during that particular period when he was Adjutant General. The Insurance Officer, I am sure, discussed them with him. The Judge Advocate General, who at that time, as I recall, was Colonel Gross.

Q. I don't care about the man's name, just the office.

A. The Inspector General, who at that time was Colonel Smith. The Chief of Staff, who at that time was Colonel Whatley. And the Commanding General, General Sheapherd.

Q. Now, one more question—is that procedure still in existence at Fort Jackson, leaving the men's names out? But I mean those people that hold those particular offices still have that same authority?

A. That is right. They are still staffed through that same channel.

Q. Did they go through that same channel from the period of January, 1953 to August, 1953?

A. To the best of my knowledge on every memorandum they did, including 266, the one that has been introduced.

• • •

Kenneth Mason:

Q. Did he personally identify himself?

A. No. I asked him who it was. He said "Well, I wont tell you who it is but, " he said, "if you will go downstairs at the pay phone and call this number, I would like to talk with you." So, I didn't know what it was. I went down and called the number. And he told me at that time that Captain Dean was interested in having someone work out there, somebody who could have eight or ten agents out there, and work in a gentlemanly manner and conduct himself properly. And that they would be given little extra favors, so to speak. And in return for that, they would probably want some money but he would arrange a meeting between Captain Dean and myself. I told him well, that would be agreeable with me. So, later on . . .

Q. Now, did that person identify himself at any time during the conversation?

A. No sir, he never did.

Q. Did you recognize the voice?

A. No, sir.

Q. Now, did you already know Captain Dean?

A. Yes, sir, I had been in Captain Dean's office.

Q. How many times?

A. Well, he was the Post Insurance Officer there for several months. I have been in the office many times.

Q. Now, as a result of that phone call, did you make contact with Captain Dean?

A. Yes, sir, I was called later on in the day and told to meet Captain Dean at a drive-in across from the Veterans Hospital on the Sumter Highway.

Q. When were you to meet Captain Dean at that place?

A. As well as I recall, it was about eight or eight-thirty that evening.

Q. In the evening?

A. Yes, sir.

Q. Now, did you meet Captain Dean there?

A. Yes, sir, I met him out there.

Q. Now, how did you get there and how did he get there? What means of transportation?

A. Well, I went out in my car and he came out in his car. At that time he had a Chevrolet convertible.

Q. Now, how did you recognize him? You already knew him?

A. I already knew him. He was in civilian clothes.

Q. When you met him there at the drive-in, what did you do; where did you go?

A. He drove up and I got in his car and we rode up the Sumter Highway.

Q. All right. What happened during that ride?

A. Well, he told me that he was in the process of changing the Post Regulations so that a number of people could work out there and they would be people that he wanted to work, people that he recommended and so forth. He said in order to get that done, that they would need so many thousand dollars. Well, I think he told me three thousand, to begin with.

Q. Well now . . .

A. The man I talked to on the phone told me he would probably want two thousand dollars to get all the preliminary ground work done.

Q. Now, did you give him any money at that time or a short time thereafter?

A. I gave it to him the next night. I gave him two thousand dollars the next night.

Q. Did you meet him the same place or where did you meet him?

A. I met him at the same place the next night. In the meantime, I had arranged to get some money and I took the two thousand dollars.

Q. Where did you get the money?

A. Well, Mrs. Teague cashed a one thousand dollar check for me.

Q. Who is Mrs. Teague?

A. Mrs. Chappel Teague. He was in the automotive business here and I had bought several used cars from him.

Q. Is Mrs. Teague in Court?

A. Yes sir, Mrs. Teague is in Court.

Q. Now, what size check did you get Mrs. Teague to cash for you?

A. One thousand dollar check.

Q. Did she actually cash it herself or did she take it to the bank to get it cashed for you?

A. She took it to the bank to get it cashed.

Q. All right. And that was in the amount of a thousand dollars.

A. Yes, sir.

Q. Where did you get the other thousand dollars that went into the two thousand?

A. Well, I had a good bit of money with me. I don't recall, I believe I got five hundred dollars from a friend of mine by telegram, Sam Jenkins, and I had the balance with me.

Q. Now, when you made the payment of two thousand dollars to Captain Dean on February 10th, in what bills or what type of money did the two thousand dollars appear?

A. I think it was in 10's and 20's.

Q. In cash?

A. Cash, yes, sir.

Q. No part of it in check or . . .

A. No, sir.

Q. Or money order or anything of that sort?

A. All in cash.

Q. Did you take a receipt for the money?

A. No, sir.

Q. Was there anybody else present besides you and Captain Dean?

A. No one but he and I.

Q. Now, what was your understanding from Captain Dean as to what was to be done in return for the payment of that money?

A. Well, he told me that he would allow ten men to work on the Post; any ten men that I selected. But he wanted men in the insurance business who didn't misrepresent their policies to the enlisted personnel. And I told him I knew practically everyone in the military insurance business and that there were a lot of good men in it that didn't misrepresent what they were selling, and I would have ten such gentlemen there as soon as he wanted them. He said to go ahead and have the men come in. So I began to

assemble the ten men in Columbia with the intention of going to work.

Q. Did he make any statement in regard or did you discuss the matter of the Regulations at Fort Jackson?

A. Yes, sir.

Q. And what did he say, if anything, about how they were to be changed?

A. He said the regulations would be changed, that they were in the process of amending them so that it would allow us to contact the trainees.

Q. To liberalize the regulations?

A. Yes, sir, that is right.

Q. Now, did he make any further demand or did the two thousand dollars which you gave him that night satisfy him?

A. No, he wanted three thousand dollars altogether.

Q. All right.

A. I gave him two thousand dollars. And two or three days later another eight hundred, a total of twenty-eight hundred dollars in a period of about three days.

Q. What was the date of the second payment?

A. About the twelfth, I think. I made him the first one on the tenth and the other on the twelfth of February.

Q. Where did that payment take place?

A. I paid him that eight hundred dollars in his office at Fort Jackson, at the Post Insurance Office.

Q. In cash or check or how?

A. In cash.

Q. Was there anybody present at that meeting besides yourselves?

A. No, sir.

Q. Did anyone else see the money pass?

A. No, sir.

Q. Did you take a receipt for it?

A. No, sir.

Q. Was he satisfied with the twenty-eight hundred dollars?

A. Yes, sir, he said that would be all right.

Q. Now, what type of bills did that money pass hands in?

A. I don't recall.

Q. It was in cash?

A. Yes, sir.

A. I picked him up and we rode around in the car and I discussed the situation at Fort Jackson, selling insurance, with him. He said that he had just arrived there and that he was a man that could get the memorandum changed where we could work properly and everybody would be happy and that, in order to do that, he would have to have twenty-five hundred dollars. I said, "Well, I don't know any way to get up twenty-five hundred dollars. I have already given Captain Dean twenty-eight hundred dollars for the same privilege." He said, "Well, if that is the case", he said, "I will have to get in touch with the other group of men that I know in California." I said, "Well, if I don't pay you this money and you get the other group in here, are you going to allow me to work, too? He said, "No, you can't work if you don't pay the money." So I went back to Birmingham on the 3rd and borrowed some money at a couple of different places on my furniture and on my car and came back up here and gave him twenty-five hundred dollars.

Major Carl R. Shirley:

THE COURT: No, you put it into the record this morning for the purpose of getting your objections before the Appellate Court.

MR. JORDAN: Well, I think this attempts to bring out a slightly different point because I am just merely now • • • I am not going back to that, but I am trying to find out if the information came to Mason that he would have to buy off somebody else. That is what I am driving at now. And why he would attempt to buy off other people if this man could have performed the job for him. That is what I want.

THE COURT: Well, that is a matter of argument.

MR. JORDAN: Yes, sir, but I mean, can't I ask him that one question?

THE COURT: Well, you can ask him a question of whether or not he had the power—

MR. JORDAN: To change the Insurance Regulations.

THE COURT: Yes. But he has said no, so that ends it.

Mr. JORDAN: All right.

Q. (By Mr. Jordan): Now, was Colonel Wilson at that time your superior officer in any capacity?

A. Not at that time.

Q. All right. So Colonel Wilson had no authority over any phase of the life insurance at Fort Jackson from February to July of 1953?

A. No.

Q. That is correct. That is what we had yesterday. Now, insofar as this Service Unit organization that you speak of that Colonel Wilson belonged to, isn't it a matter of fact that on an Army post you have some units similar to that that take care of all headquarters personnel?

A. That is correct.

Q. That is purely for administrative purposes, is it not?

A. That is right. That is correct.

Q. Pay purposes and things of that kind?

A. Right.

Q. It actually has no function in the military sense other than bookkeeping function, isn't that correct?

A. That is generally correct.

Q. So, the fact that Colonel Wilson was in the Adjutant General section he was technically a member of this Service Unit for pay purposes and bookkeeping?

A. Well, for Morning Report purposes is what we normally call that.

Q. Well, all administrative purposes?

A. That is right.

Q. And when he was relieved of that command, relieved of that position, he continued to be a member of that Service Unit?

A. That is right.

Q. Which any itinerant officer who was unassigned would also be a member of that unit?

A. He could be, that is right.

Q. So, after January 14th, though he remained a member of that Service Unit, he had no official duties with anybody, did he?

A. To the best of my knowledge, he didn't.

JUDGE TIMMERMAN'S CHARGE TO JURY

Now, Gentlemen of the Jury, I charge you that it is illegal for an officer or an official of the Government to accept money from any person to influence his official conduct with respect to any matter or proceeding, regardless of whether or not such officer is in a position or does deliver the goods for which he solicits money or accepts money.

In other words, in a case of bribery such as this, it is not essential that the object of the bribery be accomplished. It is essential that it be proved—as in one set of the charges —that a solicitation was made for the payment of the bribe to influence or bring about certain official conduct on the part of the party or parties making the solicitation. Insofar as the other set of charges is concerned, it is sufficient that they receive the money to influence their official conduct, whether the object to be accomplished and expected by the payment of the price is ever accomplished or not.

Now, the Government has asked me to charge you; The gist of the offense of bribery is the giving of money to an officer of the United States to impede the success of a lawful function of government. I charge you that in connection with the Statute that I have read to you and with other comments that I have made. I warn you, Gentlemen of the Jury, that no judge can give you all the law in one sentence. He can give you the different phases and you must take them all together collectively.

In any prosecution for bribery it is immaterial whether or not the person soliciting or accepting the bribe has the power to accomplish the result which the offerer of the bribe desires or expects. I charge you that.

MOTION FOR JUDGMENT OF ACQUITTAL

Mr. JORDAN: Your Honor, at this time I would like to make a motion for a judgment of acquittal on the grounds that the facts, as brought out by the Government, do not warrant a conviction under Section 202 of Title 18, U. S. Code annotated; on the grounds that the basic substance of that section of the Statute has not been proven by any

testimony, and all the evidence in the Court indicates that the defendant does not qualify within that section.

The COURT: I will have to overrule the motion and submit the case to the jury. Bring the jury back.

• • •

Mr. JORDAN: Your Honor, I want to renow the same motion I made; I mean the wording of the statute.

EXCEPTIONS TO CHARGE TO JURY

Mr. JORDAN: Yes, sir. I want to make an exception to three phases of Your Honor's charge. One was the government's request, which was the second one you used—that in any prosecution for bribery it is immaterial whether or not the person soliciting or accepting the bribe has the power to accomplish the result of the offer of the bribe. I think perhaps I took Your Honor's words down nearly correctly.

The COURT: Well, I think that I phrased that probably that way because of the very question you raised. I wanted to be sure that you got the full advantage of it.

Mr. JORDAN: Then Your Honor charged that it is illegal for an officer to accept money to influence his conduct regardless of whether he is in a position to deliver the goods. I take an exception to that, sir.

The COURT: That is the same thing, practically.

Mr. JORDAN: And it is only necessary—I believe these are approximately your words—to prove that the bribe was for the purpose of influencing any conduct of an officer. Those three, sir.

• • •

MOTION FOR NEW TRIAL

Mr. JORDAN: Well, first I would like to note a motion for a new trial, if Your Honor pleases, on the ground that the evidence does not sustain the verdict of the jury.

• • •

The COURT: All right. The motion is denied.

• • •

SENTENCE

The COURT: On each of the counts five, six, seven, eight and nine, the sentence and judgment of the Court is that you be committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of one year and that you pay a fine of two hundred dollars. The sentence under the sixth, seventh, eighth and ninth counts shall run concurrently, and also to run concurrently with the sentence to be pronounced on count eleven, the conspiracy count. The sentence and judgment of the Court under count eleven is that you be committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of three years and that you pay a fine of two hundred dollars. The sentence under all counts except the fifth will be suspended upon five years' probation. That means that I have given you a sentence on the six counts for a year and the conspiracy count for three years, and I am allowing those commencing with the sixth count to run concurrently. That leaves you to serve one sentence on Count five, after which you will go on probation.

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385575—56

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 814

ERNEST P. WILSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 11–20; R. 60–72) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on February 29, 1956 (R. 74). The petition for a writ of certiorari was filed on March 30, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether petitioner, a United States Army Colonel, had sufficient authority in relation to the subject matter for which bribes were given to render him punishable under 18 U. S. C. 202.

STATUTE INVOLVED

18 U. S. C. 202 provides:

> Whoever, being an officer or employee of, or person acting for or on behalf of the United States, in any official capacity, under or by virtue of the authority of any department or agency thereof, or an officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or of both Houses thereof, asks, accepts, or receives any money, or any check, order, contract, promise, undertaking, obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of anything of value, with intent to have his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, influenced thereby, shall be fined not more than three times the amount of such money or value of such thing or imprisoned not more than three years, or both; and shall forfeit his office or place and be disqualified from holding

any office of honor, trust, or profit under the United States.

* * * * *

STATEMENT

In the United States District Court for the Eastern District of South Carolina, petitioner, together with Everett L. Dean, was charged in an eleven-count indictment (R. 3–12) with soliciting and accepting bribes to influence his action on behalf of the United States and with conspiracy to do so. 18 U. S. C. 202, 371. He was convicted by a jury on all counts submitted to it[1] and was sentenced to one year imprisonment and a $200 fine on each of counts 5, 6, 7, 8 and 9, and three years' imprisonment and a $200 fine on count 11, with sentences on all counts except 5 to run concurrently and to be suspended on five years probation (R. 23). On appeal the conviction was unanimously affirmed (R. 60–72, 74).

The facts pertinent to the issues raised by the petition for a writ of certiorari may be summarized thus:

From August 31, 1951, until January 14, 1953, petitioner was Adjutant General at Fort Jackson (R. 12). As such, his duties embraced general

[1] Count 10 concerning acceptance of money on June 18, 1953, was voluntarily withdrawn by the Government. Counts one to four concerned Dean alone and were not at issue in petitioner's trial, which followed Dean's. Dean had pleaded guilty on the third day of his trial.

supervision over all activities within the Adjutant General's Section including issuance, enforcement, and possible change of regulations with respect to the soliciting and sale of insurance to soldiers at the base (R. 46, 14). His position was in a chain of command which included the Insurance Officer (co-defendant Dean), the latter's immediate supervisor, the "A. G. Executive Officer," the Adjutant General (petitioner), the Judge Advocate General, the Inspector General, the Chief of Staff, and the Commanding General (R. 14).

On January 14, 1953, petitioner was relieved of his assignment as Adjutant General and was placed in a duty unassigned status, "left free to pursue his own activities" (R. 12, 13). He was next assigned to duty in September 1953 as "Assistant G–3," and in November 1953 was ordered to a Transfer Center and retired from the Army (R. 13).

Kenneth Mason, an insurance salesman, testified that in February 1953, he received a telephone call from a man who, refusing to identify himself, inquired whether he would like to work at Fort Jackson, and told him that Captain Dean "was interested in having someone work out there," with eight or ten agents (R. 15, 17). They "would be given little extra favors so to speak"; and in return for that "they would probably want some money" (R. 15, 33). Mason

already knew Dean, who was Post Insurance Officer (R. 15). The caller arranged that Mason meet Dean at the drive-in on Sumter Highway (R. 15, 34). At the meeting Dean told Mason that he was in the process of changing the Post Regulations so that a number of people whom he recommended could work at the base but that he would need three thousand dollars (R. 16). Mason obtained two thousand dollars by borrowing and paid it to Dean next night, in ten and twenty dollar bills, getting no receipt (R. 16, 17). A few days later Mason paid Dean another eight hundred dollars (R. 18). In return for this, Mason was to assign to sell insurance to the trainees at Fort Jackson ten men who would not misrepresent their policies (R. 17). Mason started assembling a crew in Columbia, South Carolina (R. 18).

By May 31st, Mason's men had not been allowed to start selling at the base and Mason had gone home to Birmingham (R. 34). There he received a long distance call from Dean who told him that the Post had a new adjutant, Colonel Russell (R. 34). Dean asked Mason to come back to Columbia to meet him and told him that more money would be needed (R. 35). He arranged a clandestine meeting at the same drive-in and instructed Mason, on leaving him, to drive to a cemetery entrance where he would find a man sitting waiting whom he should address as Colonel Russell (R. 35). Mason met

Wilson who represented himself to be Colonel Russell (R. 35, 36). Petitioner told Mason that "he had just arrived there * * * that he could get the memorandum changed * * * and everybody would be happy * * *" and that he would have to have twenty-five hundred dollars (R. 36). Mason protested that he had already paid Dean $2,800 for the same privilege and petitioner told him that, if he did not pay, another group of insurance men would be allowed in (R. 36). Mason went back to Birmingham, borrowed on his furniture and car and raised the money which he gave to petitioner on June 5th, believing that he was dealing with Colonel Russell (R. 36). A short time later petitioner called Mason and demanded fifteen hundred dollars more (R. 37). Mason succeeded in raising the additional money which he paid in two installments, eleven hundred to petitioner in Mason's car and four hundred to Dean for "Colonel Russell" (R. 38).

Dean testified (R. 39) that Wilson told him that he had talked to Mason and that Mason would be out to see him (R. 39, 40). Dean also testified that "two or three months after February" Colonel Wilson "told me to tell Mason that the new A. G. wanted to see him" and that he did so; that he (Dean) took Mason to the neighborhood where he was to meet Colonel Russell, and went on home (R. 41–45). A few days later Dean inquired of Wilson how he made out and Wilson replied "Okay" (R. 42).

When the post was not opened to the sales crew, discontent on Mason's part (R. 50–56) resulted in exposure of the scheme (Pet. 4).

ARGUMENT

1. Petitioner does not contest his conviction for conspiracy to commit bribery. Since the sentences on the other counts which were suspended run concurrently with the conspiracy sentence, the only count of materiality here is Count 5 (R. 5) which charges that, in June 1953, petitioner and Dean asked for money with intent to have their official decisions with respect to regulation of the sale of life insurance influenced thereby.

Petitioner contends (Pet. 5–8) that his actions in demanding money of Mason do not constitute a violation of 18 U. S. C. 202 because at the time he, posing as Colonel Russell, solicited the money (the act on which Count 5 is based) he was in an unassigned status with no official duties to perform in the matter of insurance sales regulation. He argues (Pet. 7) that his use of a fictitious name is itself a sign that he knew he had no power to influence official action.

Petitioner, however, was in fact an officer of high rank in the Army. He clearly did have power to influence Dean who did have official duties relating to insurance regulation, a fact of which Mason was aware. Petitioner's position in the Army at the particular post to which he

was assigned was the factor which made it possible for him to get bribes from a person who was dealing with the Army. That was enough to make him amenable to Section 202. As was said in *Canella* v. *United States,* 157 F. 2d 470, 481 (C. A. 9), "whenever officers of the United States Army take any action whatever in regard to the army their official duties are involved."

18 U. S. C. 202 punishing bribetakers (like its companion statute (18 U. S. C. 201) which punishes bribegivers) uses broad language commensurate with the fidelity required of officers handling the affairs of the United States in fiduciary capacities:

> Whoever, being an officer or employee of, or person acting for or on behalf of the United States, in any official capacity, under or by virtue of the authority of any department or agency thereof * * * asks, accepts, or receives any money * * * with intent to have his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, influenced thereby, * * *.

The statute speaks of matters which may come before the potential bribetaker in his official capacity or in "his place of trust or profit." Regardless of his current duty assignment petitioner

held a position of trust and profit as a commissioned officer, and it is clear that any action in such capacity is within the class of conduct which the statute was designed to protect from corruption.

Lack of final authority or effective control with respect to the subject matter of the bribe has consistently been held no bar to conviction for acceptance of bribes under the statute. In *United States* v. *Holmes,* 168 F. 2d 888 (C. A. 3), the court affirmed conviction of an OPA investigator for acceptance of a bribe in connection with overceiling sales by a meat dealer, though the defendant had already turned in to his superiors a report of the violations, so that the matter was thereafter seemingly beyond his authority or control. And in *Whitney* v. *United States,* 99 F. 2d 327 (C. A. 10), defendant's conviction for soliciting bribes for recommending approval of sales of tombstones for Indians was affirmed, though the evidence showed that defendant's duties as a senior clerk in the Indian agency were purely routine and consisted in assembling necessary data for submission of bids, without any authority for decision in the matter. The court held that "It does not matter whether, when accepting a bribe to do an act apparently within his jurisdiction, he actually had such jurisdiction". To the same effect are *Krogmann* v. *United States,* 225 F. 2d 220, 225 (C. A. 6);

Hurley v. *United States*, 192 F. 2d 297 (C. A. 4); *Cohen* v. *United States*, 294 Fed. 488 (C. A. 6), certiorari denied, 264 U. S. 584; *Rembrandt* v. *United States*, 281 Fed. 122 (C. A. 6), certiorari denied, 260 U. S. 731. Cf. *United States* v. *Birdsall*, 233 U. S. 223; *Canella* v. *United States*, 157 F. 2d 470 (C. A. 9); *Cohen* v. *United States*, 144 F. 2d 984 (C. A. 9), certiorari denied, 323 U. S. 797, rehearing denied 324 U. S. 885.

In *United States* v. *Hood*, 343 U. S. 148, 151, appellees were indicted for soliciting contributions in consideration of a promise to exert influence in obtaining "appointive office * * * under the United States". The trial court had dismissed certain counts of the indictment on the ground that the positions in question were not in existence at the time of the solicitation nor at any time thereafter up to the return of the indictment. This Court reversed, in language apposite to petitioner's case:

> "This Act penalized corruption. It is no less corrupt to sell an office one may never be able to deliver than to sell one he can. Dealing in futures also discredits the processes of government. There is no indication that this statute punishes delivery of the fruits of the forbidden transaction—it forbids the sale. The sale is what is here alleged. Whether the corrupt transaction would or could ever be performed is immaterial. We find no basis

for allowing a breach of warranty to be a defense to corruption."

2. There is no foundation for petitioner's contention that there is conflict in the United States Courts of Appeals in the interpretation of this statute.

The only case cited which appears even superficially in conflict is *Blunden* v. *United States*, 169 F. 2d 991 (C. A. 6) where Blunden's conviction of bribing Flisek, a civilian chief of a stock control division of an ordnance depot, was reversed. Flisek had under his control property designated as "mission" property received for issuance to the Army and "surplus" property, which was under the War Assets Administration (not the Army) and over which Flisek's authority extended only in moving it within the depot. Defendants, who were interested in obtaining surplus property for resale, obtained from him a promise to earmark certain motors for their account and to notify them when they were ready. The motors were mission property, not surplus property. In reversing the conviction, the Court of Appeals held that Flisek's complete lack of authority in the premises made his conduct tantamount to stealing the property[2] and that the bribe was therefore not to influence official action.

[2] The opinion states that Flisek had been convicted of stealing the property.

While the *Blunden* decision is open to question,[3] the differences between it and this case are such that there cannot be said to be a conflict between the two circuits. Flisek, the bribetaker, in effect merely stole Government property and transferred it to the bribegivers whereas petitioner solicited and accepted money for the purpose of having Army regulations changed in favor of the bribegivers. Flisek was a civilian employee of relatively low rank who had no authority over the disposition of the property which he stole. Wilson was an officer of high rank who, though not assigned to duty with respect to the particular subject matter at the time of his offense, nevertheless was able to exert influence in order to have an inferior officer so assigned undertake a bribery scheme with him.

The Sixth Circuit in *Blunden* adhered to the principle enunciated in its prior decision in *Rembrandt* v. *United States,* 281 Fed. 122 certiorari denied, 260 U. S. 731 and *Cohen* v. *United States,* 294 Fed. 488 certiorari denied, 264 U. S. 584, holding that the bribery statutes cover officers whose "advice and recommendation" would be influential in securing the desired decision, even though the employee did not have authority to make the final ruling. 169 F. 2d at p. 994. The

[3] The Fourth Circuit did question it in *Hurley* v. *United States*, 192 F. 2d 297, 300.

same court reiterated the principle in *Krogmann* v. *United States*, 225 F. 2d 220, 225 (C. A. 6), cited by petitioner as authority for his position. That principle is sufficient for this case.

3. Petitioner argues that there was error in the holding of the Court of Appeals that he could be found guilty under the facts proved as an aider and abettor of Dean and thus a principal under 18 U. S. C. 2. The court's ruling in this respect is not necessary to its decision since it found petitioner guilty as a principal. Particularly in relation to Count 5, where Dean set up the meeting between Mason and petitioner posing as the Adjutant General, after Dean had failed to keep his former promises, the aider and abettor theory has considerable merit. We do not rely on it, however, not because petitioner was not charged as such,[4] but because it does not appear that the case was submitted to the jury on this basis.

CONCLUSION

The judgment below is in accord with established principles of law and there is no conflict in interpretations of the statute in the Court of Appeals. It is therefore respectfully submitted

[4] Since under 18 U. S. C. 2 an aider and abettor is a principal, the indictment may properly charge him as a principal.

that the petition for a writ of certiorari should be denied.

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